

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**



In the Matter of)
)
)

Schering Plough Corporation,
a corporation,)
)

Upsher Smith Laboratories, Inc.,
a corporation,)
)

and)
)

American Home Products Corporation,
a corporation)
)
_____)

Docket No. 9297

**AMERICAN HOME PRODUCTS CORPORATION'S MOTION SEEKING
LEAVE TO REQUIRE THAT ALL BRIEFING REGARDING ITS MOTION FOR
PROTECTIVE ORDER BE FILED UNDER SEAL**

Respondent American Home Products Corporation ("AHP") respectfully moves for an order allowing it to file under seal a motion for protective order and accompanying exhibits.¹ AHP also requests that this Court order that all briefing on AHP's motion be filed under seal. The motion relates to certain attorney-client privileged and work product documents that AHP recently discovered had been inadvertently produced to the staff at the Bureau of Competition during the Federal Trade Commission's ("FTC") pre-Complaint investigation of this matter. AHP has requested complaint counsel and the other Respondents to return the inadvertently produced materials, but complaint counsel have refused to do so absent a court order. As a result, AHP has prepared and is ready to file a motion for protective order, which attaches the inadvertently produced documents as exhibits and which requests that this Court order complaint

¹ Complaint counsel and counsel for the other Respondents have been contacted and do not oppose AHP's request to file its motion for protective order and accompanying exhibits under seal.

counsel to, *inter alia*, immediately return the inadvertently produced privileged materials to AHP. It is necessary for all briefing on AHP's motion for protective order to be under seal to prevent any further disclosure of attorney-client privileged and work product information. AHP's interest in protecting from further disclosure the privileged and confidential information outweighs any interest the public may have in keeping the briefing on AHP's motion unsealed.

Accordingly, this Court should grant AHP's motion and enter an order requiring that all briefing on AHP's motion for protective order be filed under seal. Because AHP's motion for protective order references and attaches documents which AHP claims is privileged from discovery, AHP further requests that this Court relieve AHP of the Rule 3.22(a) requirement that it file its motion for protective order and exhibits with the Secretary of the Commission. Alternatively, if this Court deems that AHP must file its motion and exhibits with the Secretary, AHP seeks an order requiring that all briefing on AHP's motion be filed with the Secretary in two versions: a non-public, confidential version and a redacted, public version.

BACKGROUND

On June 25, 2001, complaint counsel served counsel for AHP with a Rule 3.33(c) Notice of Deposition, which required AHP to produce a witness to testify about six documents, five of which are protected from discovery by the attorney-client privilege and the work product doctrine. See Notice of Deposition, attached as Exhibit 1. AHP's counsel has notified complaint counsel that their deposition notice relates to inadvertently produced privileged documents and demanded that complaint counsel return these documents. See Letter from Cathy Hoffman to Andrew Ginsburg, dated July 20, 2001, attached hereto as Exhibit 2. After an exchange of further correspondence, complaint counsel, on July 27, 2001, refused to return any of the inadvertently produced documents, claiming, among other things, that there "is no credible

argument that the documents were disclosed inadvertently” and that AHP had waived any privilege. See Letter of Bradley Albert to Cathy Hoffman dated July 27, 2001, attached hereto as Exhibit 3. In their July 27th letter, complaint counsel stated that they expected AHP to either produce a deposition witness or petition the court for a protective order.

In response to complaint counsel’s July 27th letter, counsel for AHP has prepared a motion for protective order. In that motion, AHP explains why it is entitled to a return of the inadvertently produced documents. AHP also attaches the inadvertently produced documents as exhibits to its motion. AHP does not want to risk further disclosure of the inadvertently produced documents, or information contained therein, by disclosing the documents or information in a public filing. Accordingly, AHP has filed this unopposed Motion.

ARGUMENT

THIS COURT SHOULD SEAL THE MOTION FOR PROTECTIVE ORDER AND ACCOMPANYING EXHIBITS AND RELIEVE AHP OF ITS OBLIGATION TO FILE THE MOTION AND EXHIBITS WITH THE SECRETARY

A. This Court Has The Power To Grant The Relief Sought By AHP

It is well established that “[a] Court has discretionary power to control and seal, if necessary, records and files in its possession.” Crystal Grower’s Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980); see, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978). Congress vested this Court with the discretionary authority to seal records filed during an administrative proceeding. Section 556(c)(5) of Title 5 of the United States Code and the conforming Rule of Practice, Rule 3.42(c), make clear that this Court has broad authority “to consider and rule upon as justice may require, all procedural and other motions appropriate in an adjudicative proceeding . . .” and “to take any action authorized by the rules.” Pursuant to Rule 3.31(d)(1), “the administrative law judge may deny discovery or make any order which

justice requires to protect a party . . . from annoyance, embarrassment, oppression”

(emphasis added).²

The broad authority granted to this Court by Congress and pursuant to Rules 3.42(c) and 3.31(d) necessarily includes the power to seal records that contain privileged and confidential information, the disclosure of which would greatly prejudice the party filing the documents with the Court. This is especially so given that the only materials that this Court must make available for public inspection and copying pursuant to the Administrative Procedure Act are “final opinions and orders.” Sec. 5 U.S.C. § 552(a)(2); see also Rule 4.10(a) (providing that various types of privileged and confidential materials, including any materials obtained through compulsory process during an FTC investigation, are not required to be made public.)

Pursuant to Rule 3.31, this Court also has the power to dispense with the requirement that all briefing on AHP’s motion for protective order be filed with the Secretary of the Commission. Rule 3.22(a) requires that all written motions and responses be filed with the Secretary.³ Documents filed with the Secretary are available for public inspection. Given that the Secretary posts filings on the Commission’s website, documents filed with the Secretary are now available to the general public at the click of a finger. AHP is in need of relief from this rule because it cannot risk a further disclosure of the privileged and confidential material that it seeks to protect through its motion for protective order. A further disclosure of this confidential and privileged information obviously would greatly prejudice AHP. This Court can eliminate this prejudice by dispensing with the requirement that briefing on AHP’s motion be filed with the Secretary. It

² As clarified by amended Rule 3.46(c) concerning in camera treatment, “motions that seek pretrial or procedural rulings, and that contain confidential matter, should be handled under the procedures for protective orders . . . ;” i.e., Rule 3.31(d). See Rule 3.46(c).

³ Rule 3.22(a) provides in pertinent part that “All written motions shall be filed with the Secretary of the Commission...”

should do so. In the alternative, if this Court is not inclined to dispense with the requirement that briefing on AHP's motion be filed with the Secretary, AHP seeks an order requiring that all briefing on AHP's motion be filed with the Secretary in two versions: a non-public, confidential version and a redacted, public version.

B. Courts Routinely Seal Records Containing Materials Protected By The Attorney-Client Privilege And The Work Product Doctrine

The official records of all courts are generally made available for public inspection unless a party can demonstrate that there are countervailing interests sufficient to outweigh the public's interest in access. See Crystal Grower's Corp., 616 F.2d at 461. In exercising its discretion to seal court documents, a court must weigh the interest of the public in having access to the documents against the interests advanced by the parties in having the documents sealed. See id. In performing this balancing test, courts have routinely held that a party's interest in preserving the attorney-client privilege and the work product doctrine outweighs the more general interest of the public in having access to information filed with the court. See id. at 462; see also, In re Agent Orange Product Liability Litigation, 98 F.R.D. 539, 545 (E.D.N.Y. 1983) ("Where unsealing of documents might reveal material governed by the work product privilege or the contents of communications between an attorney and client might be disclosed, the public interest in protecting those privileges would take precedence over its interest in inspecting and copying court records."); accord, In re M & L Business Machine Co. v. Bank of Boulder, 161 B.R. 689, 692 (D. Colo. 1993); Croskey v. United States, 24 Cl. Ct. 420, 426 (Cl. Ct. 1991).

The holding in Crystal Growers is particularly instructive. In that case, the plaintiffs withheld 845 documents from discovery on the grounds that they were protected from discovery by the attorney-client privilege and the work product doctrine. Crystal Growers, 616 F.2d at

459. The trial judge ultimately ruled that any claim of privilege had been waived by the filing of the lawsuit. See id. at 460. The court also entered a protective order stating that the plaintiffs were only required to produce the documents to the defendants in the lawsuit and which otherwise treated the documents as confidential. See id. The trial court kept the 845 documents, as well as the motions and district court opinion discussing those documents, under seal. See id. On appeal, the appellate court kept under seal the parts of the appellate record that had been sealed by the trial court. See id. Following the appeal, the appellate court returned the appellate record under seal to the district court, but ordered that the appellate briefs, the joint appendix and the amended docketing statement -- all of which apparently contained references to the privileged and confidential information -- be unsealed twenty days after the records were returned to the district court. See id. at 460-61. Plaintiffs moved for a reconsideration of that ruling. See id. at 461. The appellate court reversed its decision to unseal portions of the record, reasoning that plaintiffs had a "significant interest" in preventing public disclosure of the documents at issue. See id. In so holding, the court reasoned that unsealing the documents at issue would result in a disclosure of attorney-client privileged and work product protected information and therefore would "effectively nullify" the plaintiffs' claim of privilege without a hearing on the merits. See id. The court further reasoned that unsealing the records would make the privileged and confidential communications accessible to plaintiffs in pending antitrust actions against the appellants even though such information would not otherwise be discoverable in the antitrust actions absent a determination in those actions that the documents were not privileged. See id.

As with the appellants in Crystal Growers, AHP has a significant interest in preventing public disclosure of the privileged and confidential information that it seeks to protect through its motion for protective order. If AHP is required to file the motion and corresponding exhibits

unsealed, AHP's claims of privilege and confidentiality would effectively be nullified without a hearing. This would greatly prejudice AHP. Accordingly, as in Crystal Growers, AHP's interest in protecting its privileged material from further disclosure outweighs any general interest the public may have in obtaining access to these documents. AHP's motion and exhibits, as well as all briefing on that motion, should, therefore, be sealed.

CONCLUSION

Applying the well-established precedent cited above, this Court should utilize the power granted to it by Congress and pursuant to Rules 3.31(d) and 3.42(c) and order that all briefing on AHP's motion for protective order be filed under seal. This Court also should order that all briefing on AHP motion for protective order is not required to be filed with the Secretary of the Commission. In the alternative, AHP seeks an order requiring that all briefing on AHP's motion be filed with the Secretary in two versions: a non-public, confidential version and a redacted, public version.⁴ To hold otherwise, would greatly prejudice AHP.

Dated September 17, 2001

Elliot Feinberg
AMERICAN HOME PRODUCTS
CORPORATION
Five Giralda Farms
Madison, NJ 07940
(973) 660-5000

Respectfully Submitted,



Michael N. Sohn
Donna E. Patterson
Cathy A. Hoffman
David M. Orta
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Attorneys for AHP

⁴ As distinguished from the *in camera* context, there does not appear to be any explicit authority within the rules authorizing AHP to file a confidential, non-public version of its motion for protective order with the Secretary during the pretrial phase of the case. Amended Rule 3.22(b) provides for the filing of a redacted, public version and a confidential, non-public version of motions in certain enumerated circumstances. See Rule 3.22(b). It is not clear that the enumerated circumstances set forth in that rule apply to AHP's motion for protective order. Because there appears to be uncertainty within the rules regarding this issue, AHP seeks leave for its alternative relief.

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
Schering Plough Corporation,)	
a corporation,)	
)	Docket No. 9297
Upsher Smith Laboratories, Inc.,)	
a corporation,)	
)	
)	
and)	
)	
American Home Products Corporation,)	
a corporation)	
)	

CERTIFICATE OF SERVICE

I, Emily M. Pasquincelli, hereby certify that on September 17, 2001, I caused *American Home Products Corporation's Motion Seeking Leave To Require That All Briefing Regarding Its Motion for Protective Order Be Filed Under Seal* to be served upon the following persons as follows:

Two paper copies by hand delivery to:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580 (2 copies)

The paper original and one paper copy by hand delivery and one electronic copy to:

Office of the Secretary
Federal Trade Commission
Room 11-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580 (original and 1 copy)

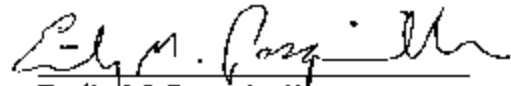
One paper copy by hand delivery to:

Karen G. Bokart

Federal Trade Commission
601 Pennsylvania Ave., N.W.
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Fax (202) 326-3384

Laura S. Shores
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Washington, D.C. 20004
Fax (202) 383-6610

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Washington, D.C. 20005
Fax (202) 639-9355


Emily M. Pasquini

**Admitted to the New York Bar
only. Practice supervised directly by
active members of the D.C. Bar.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

Andrew S. Ginsburg, Esq.
Direct Dial: 202-326-3108

June 25, 2001

Via Federal Express and Electronic Mail


Cathy Hoffman, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Re: *Federal Trade Commission v. Schering-Plough Corporation, et al.*
Docket No. 9297

Dear Cathy:

On behalf of Complaint Counsel, I have enclosed a copy of the Notice of Deposition. If you have any questions or concerns, do not hesitate to call me at 202-326-3108.

Sincerely,


Andrew S. Ginsburg, Esq.

Enclosure

cc: Laura S. Shores, Esq.
Christopher M. Curran, Esq.

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of

SCHERING-PLOUGH CORPORATION,
a corporation,

UPSHUR-SMITH LABORATORIES, INC.,
a corporation,

and

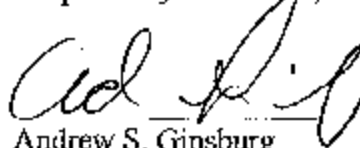
AMERICAN HOME PRODUCTS
CORPORATION,
a corporation.

Docket No. 9297

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE, that pursuant to Rule 3.33(c) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, complaint counsel will take the deposition of respondent American Home Products Corporation, as represented by one or more designated officers, directors, or other employees most knowledgeable regarding the matters set forth in Exhibit A to this notice. This deposition will be conducted before some person authorized by law to administer oaths, and will continue from day to day until completed. The testimony will be recorded by stenographic means. The deposition will be taken at the offices of the Federal Trade Commission, 601 Pennsylvania Avenue, N.W., beginning on July 9, 2001 at 9:00 AM.

Respectfully Submitted,


Andrew S. Ginsburg
Complaint Counsel

Dated: June 25, 2001

EXHIBIT A

TOPICS OF INQUIRY

1. Explanation of the document labeled Exhibit One (Bates No. AHP 13 00025) in the Investigational Hearing for Michael S. Dey which took place on October 5, 2000. This explanation would include, but is not limited to, testimony as to who created the document, why it was created, how it was created, when it was created, what are the assumptions which underlay the figures, analysis, or other facts presented, the meaning of any terms, assumptions, or other words listed, to whom it was distributed, who used it and in what capacity, and any other relevant information pertaining to the document. Additional specific topics of inquiry include the source of the data in Exhibit One and what said data reflects, including which products, forms, dosage strengths, and chemical compounds are covered or included.
2. Explanation of the document labeled Exhibit Four (Bates No. AHP 13 00115) in the Investigational Hearing for Michael S. Dey which took place on October 5, 2000. This explanation would include, but is not limited to, testimony as to who created the document, why it was created, how it was created, when it was created, what are the assumptions which underlay the figures, analysis, or other facts presented, the meaning of any terms, assumptions, or other words listed, to whom it was distributed, who used it and in what capacity, and any other relevant information pertaining to the document. Additional specific topics of inquiry include an explanation of assumption three, which reads "ESI Lederle enters with other two competitors", the basis of assumption four, which reads "Price settles at 50% of brand first year and declines 15% there after", and the market of which ESI's generic share is calculated on the chart.
3. Explanation of the document labeled Exhibit Five (Bates No. AHP 13 00117) in the Investigational Hearing for Michael S. Dey which took place on October 5, 2000. This explanation would include, but is not limited to, testimony as to who created the document, why it was created, how it was created, when it was created, what are the assumptions which underlay the figures, analysis, or other facts presented, the meaning of any terms, assumptions, or other words listed, to whom it was distributed, who used it and in what capacity, and any other relevant information pertaining to the document. Additional specific topics of inquiry include an explanation of to what the phrase in the document which reads "ESI incurs legal cost to fight Key" refers.
4. Explanation of the document labeled Exhibit Six (Bates No. AHP 13 00118) in the Investigational Hearing for Michael S. Dey which took place on October 5, 2000. This explanation would include, but is not limited to, testimony as to who created the document, why it was created, how it was created, when it was created, what are the assumptions which underlay the figures, analysis, or other facts presented, the meaning of

any terms, assumptions, or other words listed, to whom it was distributed, who used it and in what capacity, and any other relevant information pertaining to the document. Additional specific topics of inquiry include any and all reasons why generic prices in Exhibit Six are higher than generic prices in Exhibit Five.

5. Explanation of the document labeled Exhibit Seven (Bates Nos. AHP 13 00104; AHP 13 00106-00114) in the Investigational Hearing for Michael S. Dey which took place on October 5, 2000. This explanation would include, but is not limited to, testimony as to who created each and every page of the document, why they were created, how they were created, when they were created, what are the assumptions which underlay the figures, analysis, or other facts presented, the meaning of any terms, assumptions, or other words listed, to whom they were distributed, who used them and in what capacity, and any other relevant information pertaining to Exhibit Seven. Additional specific topics of inquiry include the source of the figures listed in the row labeled "Substitution Rate" found on AHP 13 00106, which products were included in the market shares found on AHP 13 00106-00114, and how the figures listed in any row labeled "Generic Price" found on AHP 13 00106-00114 were determined.
6. Explanation of the document labeled Exhibit Eight (Bates Nos. AHP 13 00158-00184) in the Investigational Hearing for Michael S. Dey which took place on October 5, 2000. This explanation would include, but is not limited to, testimony as to who created each and every page of the document, why they were created, how they were created, when they were created, what are the assumptions which underlay the figures, analysis, or other facts presented, the meaning of any terms, assumptions, or other words listed, to whom they were distributed, who used them and in what capacity, and any other relevant information pertaining to Exhibit Eight. Additional specific topics of inquiry include what dosage forms or strengths are included in the figures listed under "Total Potassium Market" found on AHP 13 00158, what is included in the figures listed under "K-Dur 20 mEq Gross Sales" found on AHP 13 00158, to what specific years the headings "Year-1", "Year-2", "Year-3", "Year-4", and "Year-5" on AHP 13 00158 refer, and the relationship between the forecasts on AHP 13 00158-00163 and those on AHP 00164-00184.

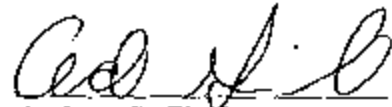
CERTIFICATE OF SERVICE

I, Andrew S. Ginsburg, hereby certify that on June 25, 2001, I caused a copy of the Notice of Deposition to be served upon the following persons by Federal Express and electronic mail.

Cathy Hoffman, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Laura S. Shores, Esq.
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Christopher M. Curran, Esq.
White & Case LLP
601 13th Street, N.W.
Washington, D.C. 20005

A handwritten signature in black ink, appearing to read "Andrew S. Ginsburg", written over a horizontal line.

Andrew S. Ginsburg
Complaint Counsel

ARNOLD & PORTER

Cathy Hoffman
Cathy.Hoffman@aporter.com

202.942.5123
202.942.5899 Fax

555 Twelfth Street, NW
Washington, DC 20004-1706

July 20, 2001

BY TELECOPY & U.S. MAIL

Andrew S. Ginsburg, Esq.
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, NW
Washington, D. C. 20580
Telecopy: (202) 326-3384

Re: *In the Matter of Schering-Plough Corp., Upsher-Smith
Laboratories, and American Home Products, Docket No. 9297*

Dear Andrew:

I am writing in response to your letter dated July 13, 2001 and to complaint counsel's rule 3.33(c) Notice of Deposition, dated June 25, 2001. As you know from our prior discussions, we have been working diligently to locate responsive information and a company witness to testify about those documents and matters set forth in the Notice of Deposition. While conducting that investigation, we recently have learned that most and likely all of the documents referenced in the Notice of Deposition are protected from discovery by the attorney-client privilege and by the attorney work product doctrine. Specifically, during the course of our investigation to respond to the Notice of Deposition, we have learned that those documents marked as Exhibits 4-6 and 8 to the October 5, 2000 pre-Complaint deposition of Michael Dey, Ph.D. were prepared at the request of counsel and contain the mental impressions of counsel. Based upon what we have learned, it also is likely that Exhibits 1 and 7 to Dr. Dey's deposition were prepared at the request of counsel, and therefore also are privileged. However, we still are finalizing our investigation of that question.

Similarly, during our Rule 3.33(c) investigation, we also learned that two additional documents, bearing bates numbers AHP 13 00089 - 93 and AHP 13 00097 - 99, were prepared at the request of counsel and contain the mental impressions of counsel.¹ Those documents therefore also are protected from discovery by the attorney-

¹ Two other documents, bearing bates numbers AHP 13 000124 - 125 and AHP 13 00130 - 131, also may have been prepared at the request of counsel, and therefore may also be privileged, but we still are finalizing our investigation of that question.

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Andrew S. Ginsburg, Esq.
July 20, 2001
Page 2

client privilege and the attorney work product doctrine. Each of these documents was inadvertently produced to the staff at the Bureau of Competition during the FTC's pre-Complaint investigation.

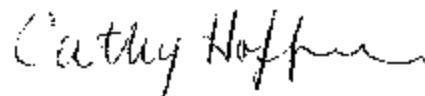
We hereby request that you immediately return the six documents that we have confirmed are privileged and were inadvertently produced, as well as any copies you may have made thereof, to me by no later than Friday, July 27, 2001. We also hereby request that you immediately retrieve and return any copies of these documents which complaint counsel has distributed to others, including experts, by that date. If you have any copies of these documents that contain the mental impressions of counsel and/or other work product notations, we ask that you immediately destroy those copies. Lastly, we ask that you return to me all copies of Dr. Dey's October 5, 2000 deposition transcript so that we may redact all testimony relating to the privileged documents. We will return the redacted copies of the transcripts to you once we have done so. The return of these privileged documents is mandated by the law applicable to this case, Judge Chappell's prior rulings on similar issues in the Hoechst/Andrx matter and by the language and spirit of the Protective Order in this case, specifically paragraph 17 thereof.

By copy of this letter, we are requesting counsel for respondents Schering-Plough and Upsher-Smith to follow the same procedures.

Because most and likely all of the documents identified in Complaint Counsel's June 25th Notice of Deposition are privileged, AHP will not be producing a Rule 3.33(c) witness in response to the Notice at this time. As soon as we determine whether Exhibits 1 and 7 are privileged, we will notify you. Should it turn out that those documents are not privileged, then we will contact you to determine whether complaint counsel would like a Rule 3.33 (c) witness as to those documents.

If you have any questions about any of the issues set forth in this letter, then please call me.

Sincerely,



Cathy Hoffman

cc: Karen Bokar, Esq.

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July 20, 2001
Page 3

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Andrew S. Ginsburg, Esq.
July 20, 2001
Page 4

bcc: Elliot Feinberg, Esq.
207 Team



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

Bradley S. Albert, Esq.
Direct Dial: 202-326-3670

July 27, 2001

VIA FACSIMILE AND U.S. MAIL

Cathy Hoffman, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Re: *In the Matter of Schering-Plough Corp., Upsher-Smith Laboratories, and
American Home Products Corp., FTC Docket No. 9297*

Dear Cathy:

I am writing in response to your letters dated July 20, 2001 and July 25, 2001. You have asked complaint counsel to return Exhibits 4-6 and 8 of the October 5, 2000 Investigational Hearing of Michael S. Dey, Ph.D., as well as AHP 13 00089-93 and AHP 13 00097-99, claiming that all were inadvertently produced. For the reasons described below, we have decided not to return any of these documents at this time.

First, you claim that returning these documents is mandated by the "language and spirit" of Paragraph 17 of the Protective Order. We disagree. Paragraph 17 applies only to "[t]he production or disclosure of any Discovery Material made *after* entry of this Protective Order" (emphasis added). The documents at issue were produced on February 22, 2000 and March 7, 2000, well *before* the filing of the Complaint, let alone the entry of the Protective Order.

In addition, as the title of Paragraph 17 makes clear, that provision covers only the "inadvertent" production of documents. AHP's production of the disputed documents can in no way be described as inadvertent. Inadvertent or involuntary disclosures occur, for example, when in the midst of a voluminous production, a privileged document is mistakenly included.

Here, by contrast, AHP turned the materials over to the FTC more than one year ago, among a very limited number of documents. Then, on October 5, 2000, complaint counsel used most of the documents asked to be returned in the Investigational Hearing of Dr. Dey (Exhibits 4-6 and 8). AHP's outside counsel, Kenneth A. Letzler and Randal M. Shahcen, as well as its inside counsel, Elliot Feinberg, were present. During a hearing which lasted an entire day in which the disputed documents were specifically reviewed by the witness and counsel, no one

Cathy Hoffman, Esq.
July 27, 2001
Page 2

raised any privilege issue concerning or relating to any of these Exhibits. Since that hearing, more than seven months ago, the documents have remained in the Commission's possession and still there was no assertion of any so-called "privilege" until last week. Under these facts, there is no credible argument that the documents were disclosed inadvertently.

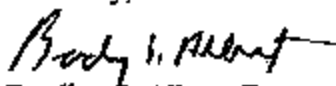
Second, even under the procedures laid out in the Protective Order for inadvertently produced documents, we are under no obligation to return materials which on their face appear to be non-privileged business documents. There is no evidence whatsoever that these documents, which include data, sales forecasts, and financial scenarios, reflect any communication between client and counsel needed for a claim of attorney-client privilege. Nor is there evidence of the thoughts or mental impressions of counsel, which could form the basis for a claim of work-product privilege. In addition, the explanation provided in your letter of July 25, 2001 as to why you believe the materials are privileged has not altered our analysis based on a facial review of the documents.

Finally, under the circumstances, AHP clearly has waived any privilege that may have attached at some point to the disputed documents.

We await the results of your investigation as to Exhibits 1 and 7 in the Investigational Hearing of Dr. Dey as well as AHP 13 00121-125 and AHP 13 00130-131.

We expect that AHP promptly will either produce a witness, pursuant to Rule 3.33(c), in response to the Notice of Deposition dated June 25, 2001, or petition the court for a protective order. If you have any questions about our response, please contact me at 202-326-3670.

Sincerely,


Bradley S. Albert, Esq.

cc: Laura S. Shores, Esq.
Christopher M. Curran, Esq.